S. 2034
Section-by-Section Analysis

1. Section 1 would repeal the provisions of section 5(c) of the Communications Act, relating to the review staff. Under these provisions, the review staff, even though it has no other functions than assist the Commission in adjudicatory cases, is nevertheless precluded from making any recommendations to the Commission. This restriction is wasteful and inefficient, since it deprives the Commission of the full assistance of which this review staff is capable, and requires the two-step procedure of instructions and draft order even as to the most routine interlocutory matters. The repeal of these unduly restrictive provisions should contribute to speedier action, without depriving parties of any rights in view of the continuing safeguards of section 409(c) of the Communications Act and section 5(c) of the Administrative Procedure Act.

2. Section 2 would permit the Commission to delegate any of its functions, including those in adjudicatory cases, to a panel of Commissioners, or individual Commissioners or employees, or an employee board (with the exception that adjudicatory hearings could only be conducted by one of the three authorities specified in section 7(a) of the Administrative Procedure Act). The decision of the authority to whom the matter was delegated could then be reviewed, in whole or in part, by the Commission, either upon its own initiative or upon an application for review filed by a person aggrieved by the decision, but the Commission could deny such application without assigning any reasons

therefor. The filing of an application for review is made a condition precedent to judicial review of a delegated decision; and the application cannot rely on questions of fact or law upon which the delegated authority has been afforded no opportunity to pass. In this way, the case will be presented to the Commission (and if the application is denied, to the courts) with a ruling on every issue, and the Commission will have an opportunity to review the decision before the matter goes before the courts.

These provisions will give the Commission much needed authority, now withheld under present section 5(d)(1), to employ panels of Commissioners or employee boards to pass on adjudicatory cases. Under the present law, it is necessary for the full Commission to hear every adjudicatory case, including such matters as fishing boat suspensions or the most routine aural broadcast cases. With the new authority the Commission will be able to concentrate on the important cases involving major policy or legal issues, and the hearing of all cases by some authority within the agency should be substantially expedited.

3. Section 3 would revise section 405, relating to petitions for rehearing, so as to reflect the above-described statutory scheme. As revised, the section would permit an aggrieved party to file a petition for rehearing only to the authority making the decision, that is, to the Commission, if it made the decision, or to the designated authority under the new 5(c)(1), if it issued the decision.

4. Section 4 would make extensive revisions in section 409, which contains general provisions relating to adjudicatory proceedings. First, it specifies in subsection (a) that the hearing shall be conducted in accordance with the provisions of the Administrative Procedure Act and such other rules as the Commission may prescribe not inconsistent therewith. This latter provision is intended to make clear that the Commission, in its discretion, may adopt hearing safeguards even more stringent than those specified in the Administrative Procedure Act. Further, subsection (a) amends the present 409(a) by permitting one or more Commissioners to conduct the hearing, in accordance with the provisions of 7(a) of the Administrative Procedure Act.

Second, subsection (b) would retain the right of a party to file exception, which must be passed upon by the Commissioner or a designated authority within the Commission (e.g., a panel of Commissioners or employee board); it would eliminate the other provisions of 409(b) as unnecessary in view of the provisions of section 8 of the Administrative Procedure Act.

Further, it would change the existing law by making oral argument discretionary rather than mandatory. This does not mean that oral argument will no longer be available. On the contrary, it is expected that this valuable procedure would still be greatly employed by the Commission or the panels or employee boards. But the Commission would now have the discretion not to allow such argument in those instances where in

its judgment it would serve no useful purpose, as for example, in the case of a frivolous appeal or one having no merit or designed largely to gain delay. Every other major Federal regulatory agency presently has such discretion; clearly, the Commission should be given similar flexibility.

Third, the provisions of subsection (c) relating to ex parte presentations and separation of functions would be changed as follows:

(i) Any person, and not just those who have participated in the presentation or preparation for presentation of the case, would be enjoined from making ex parte presentations to the hearing officer or the Commission or designated authority within the Commission. This would extend the present salutory provision.

(ii) Examiners would be permitted to consult with other examiners on questions of law. Full and free discussion among the Commission's examiners of the legal issues in their cases should result in improving the quality of initial decisions and in expediting their preparation. Significantly, examiners in other agencies are governed by the standard in section 5(c) of the Administrative Procedure Act and thus are free to consult among themselves on questions of law; there is clearly no reason for proscribing such consultation in the case of the examiners of this one agency.

(iii) Where a Commissioner conducts the hearing, he may freely consult with his assistants (see sec. 4(f)(2), and may participate in Commission discussion of the case or any other

matter having similar or related issues without any restriction because of the fact that he was the hearing officer in the particular case. This provision is in line with the last sentence of section 5(c) of the Administrative Procedure Act and is intended to make clear that a Commissioner conducting a hearing may continue to participate in all Commission activities and to hear staff presentations in any matter, without raising the claim that an "indirect" ex parte presentation has been made to him.

(iv) There would be eliminated the provisions in present section 409(c) (2) and (3) proscribing in adjudicatory cases any staff contact with the Commission by the offices of General Counsel, the Chief Engineer, or Chief Accountant. Instead, only staff persons who had engaged in the performance of investigative or prosecuting functions in the case or a factually related one would be precluded from participating in the intra-Commission discussions leading to the issuance of the decision. This is the standard set out in section 5(c) of the Administrative Procedure Act, and, being directed squarely to the fairness problem involved, it is obviously the correct one. Virtually all the major administrative agencies have functioned well under it. There is thus every reason to permit the Commission to return to it. For it is clearly wasteful to cut off the Commission in an adjudicatory case from the valuable assistance of its chief legal and engineering officers, where these officers have had no

investigative or prosecutory connection with the case (or a factually related one).

Finally, subsection (d) provides that to the extent the foregoing provisions or those of the new section 5(c)(4) conflict with the provisions of the Administrative Procedure Act, the latter are superseded. This is made necessary by the statement in section 12 of the Administrative Procedure Act that no subsequent legislation shall be deemed to supersede the provisions of the act "except to the extent that such legislation shall do so expressly." This legislation clearly goes beyond the Administrative Procedure Act in two respects:

(i) The Administrative Procedure Act, in section 5(c), exempts initial licensing proceedings from the separation of functions provision; section 409(c) would include such proceedings in its reference to "any case of adjudication (as defined in the Administrative Procedure Act)." See section 2(d) of the Administrative Procedure Act.

(ii) The restriction in section 5(c) of the Administrative Procedure Act on ex parte consultation by a hearing officer is limited to "any fact in issue"; the new section 409(c) would extend the limitation to questions of law also (with the proviso that the examiner could consult with another examiner on such questions).

Section 409(b) would also appear to go beyond the provisions of section 8 of the Administrative Procedure Act by bestowing on the parties the right to file exceptions to the

initial decision. Finally, it has been argued that a ruling on the merits of every pleading filed in the case is required under sections 6(d) and 8(b) of the Administrative Procedure Act. Whatever the validity of this argument, section 409(d) of the bill, by its explicit reference to the new section 5(c)(4) which authorizes denial without assigning reasons, of the application for review of a delegated decision, obviates any question on this score.

5. Section 5 provides that all cases set for hearing by the Commission prior to the date of enactment shall continue to be governed by the second sentence of the present section 409(b). This means that in such cases the Commission must hear oral argument upon the request of the parties.

REPORT OF THE FEDERAL COMMUNICATIONS COMMISSION ON H.R. 7333, 87th CONGRESS, 1st SESSION, TO AMEND THE COMMUNICATIONS ACT FOR THE PURPOSE OF FACILITATING PROMPT AND ORDERLY CONDUCT OF THE BUSINESS OF THE FEDERAL COMMUNICATIONS COMMISSION

H. R. 7333 would markedly change the present procedural provisions of the Communications Act in the following essential respects: (a) it would abolish the review staff created by section 5(c) and significantly revise the separation of functions and ex parte ban provisions of section 409(c)(1) and (2); (b) it would abolish the present right to obtain review, including oral argument, of any initial decision and substitute therefor discretionary review, upon the vote of a majority, less one, of the Commissioners in office; (c) it would permit the Commission to delegate adjudicatory matters (now precluded by sections 5(d)(1) and 409(b)), subject to rescission by a vote of a majority, less one, of the Commissioners in office; and (d) it would transfer from the Commission to the Chairman the authority to assign Commission personnel, excluding Commissioners, to perform the functions delegated by the Commission.

We shall state our views on each of these four areas in the ensuing discussion. In general, the Commission supports the objectives of the bill in each area but, with the exception of the provision abolishing the review staff, would urge substantial revisions for the reasons set forth. We have attached, as Appendix A, a draft of a bill which would carry out the objectives of H.R. 7333 but along the lines of the revisions suggested by a majority of the Commission.

I.

1. The Commission strongly favors the repeal of the provisions of 5(c), relating to the review staff. Under these provisions, the review staff, even though it has no other functions than to assist the Commission in adjudicatory cases, is nevertheless precluded from making any recommendations to the Commission. This restriction, which is not applicable to the opinion writing staff of any other Federal regulatory agency (Davis, Administrative Law Treatise, Vol. 2, p. 197), is both wasteful and inefficient. It is wasteful in that it deprives the Commission of the full assistance of which this review staff is capable; it is inefficient because it requires a two-step procedure (of instructions and draft order) even as to the most routine interlocutory matters. The repeal of these unduly restrictive provisions should contribute to speedier action, without in any way depriving parties of any rights. On the contrary, the safeguards of section 5(c) of the

Administrative Procedure Act would be applicable; and any deficiency in this Act (such as with respect to initial licensing proceedings) could be supplied by an appropriate provision in section 409(c)(2) (see proposed revision of 409(c)(2) in Appendix A, attached hereto).

2. In section 3(c), the bill would retain the separation of functions provisions of subsection (3) of 409(c) but would eliminate the present subsection (2). The Commission believes that the proposal in section 3(c) is unsound. First, the ban in (c)(2) against ex parte presentations by a "person who has participated in the presentation or preparation for presentation of /an adjudicatory/ case . . ." should not be dropped. While it is true that ex parte presentations would be barred irrespective of section 409(c)(2), 1/ that provision does serve the function of proscribing such conduct by parties and thus could be the basis of criminal action under section 501. Furthermore, it is desirable that the law be explicit on this subject, and not dependent on case precedent, however well-established. For this reason, we propose in the draft in Appendix A to keep the proscription of (c)(2) and, indeed, to remove the present limitation, which restricts its application only to those persons who have participated in the case.

Second, it would be much sounder to return to the separation of functions provisions of section 5(c) of the Administrative Procedure Act. For again, it is wasteful and serves no valid purpose whatever to cut off the Commission in adjudicatory cases from its chief legal officer, the General Counsel (see pp. 57-58, Attorney General's Manual on Administrative Procedure Act); yet (c)(3) does this with its reference to ". . . persons engaged . . . in any litigation before any court . . ." The test laid down in the Administrative Procedure Act (section 5(c)) is the only valid one, namely, whether the staff person has engaged in investigative or prosecuting functions "in that or a factually related case." This test is directed squarely to the fairness problem involved. We have therefore proposed in Appendix A a return to the standard of the Administrative Procedure Act, with the exception that this

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1/ See, e.g., Morgan v. United States, 298 U.S. 468, 480; Morgan v. United States, 304 U.S. 1, 19-20; Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 304; Sangamon Valley Television Corp. v. United States, 269 F. 2d 221, 224 (C.A.D.C.)

standard would be applicable to all cases of adjudication, including initial licensing.

3. Section 409(c)(1) is revised in section 3(b) only by the substitution of "officer" for "examiner". Here again we suggest a return to the standard of the Administrative Procedure Act, section 5(c). 2/ The conduct of hearing officers clearly should be governed by one general standard, and not by ad hoc legislation for one particular agency; the functions of an FCC examiner in conducting an FCC case in no way differ from the functions of a FTC, ICC, etc. examiner, all of whom are governed by the Administrative Procedure Act. Rather than amending the Communications Act, the Administrative Procedure Act should be revised, if it is desired to alter the governing standard for examiners (as, for example, to permit consultation on questions of law only with fellow examiners). 3/

II.

The bill would repeal the second sentence of 409(b) and would make review of an examiner's initial decision discretionary, upon the vote of a majority of the Commissioners less one. The Commission believes that a party should have a right to obtain some administrative review of an examiner's initial decision. This is the general pattern in the Federal courts, where (with certain exceptions) a party can obtain review of a trial court's decision in the court of appeals. See 28 U.S.C. 1291. He cannot require the appeals court en banc to hear such an appeal, nor can he, as a matter of right, obtain oral argument in every case. So, also, we would bestow upon the Commission the authority to use panels or (since we are in the administrative field) employee boards and to act without oral argument in those few instances

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2/ This section provides, in pertinent part: ". . . Save to the extent required for the disposition of ex parte matters as authorized by law, no such /hearing/ officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. . ."

3/ If section 409(c)(1) is to be retained, we suggest that it be revised to permit examiners to consult fellow examiners on questions of law. Such consultation would appear desirable and does not infringe on the fairness of the proceeding. We have in App. A, section 409(c), so revised the Communications Act.

where it is appropriate to do so. But we would afford the right to administrative review.

It is no answer, we think, to say that a party can obtain judicial review of the examiner's decision, when the Commission denies further administrative review. For, the agency has far greater, and indeed completely different, leeway in reviewing an examiner's decision than does a court passing on an agency decision. Cf., Federal Communications Commission v. Allentown Broadcasting Co., 349 U.S. 358; Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474; Gray v. Powell, 314 U.S. 402; Radio Officers' Union v. National Labor Relations Board, 347 U.S. 17; Corn Products Refining Co. v. Federal Trade Commission, 324 U.S. 726. The cited cases make clear that it is the agency which has "the power of ruling on facts and policies in the first instance" (Federal Communications Commission v. Allentown Broadcasting Corp., at p. 364; section 8(a) of the Administrative Procedure Act). Thus, a party may be effectively cut off from upsetting a routine administrative decision which could go either way (cf., National Labor Relations Board v. Nevada Consolidated Copper Corp., 316 U.S. 105), simply because he cannot obtain further administrative review.

Nor do we think such mandatory review will result in clogging the Commission's processes, provided that the Commission is given full discretion with respect to delegations and oral argument. If the appeal involves routine matters, it can be heard by a panel or employee board; if it is wholly lacking in substance, it could be quickly resolved on the pleadings. Any application for discretionary review of the panel's or board's decision could be promptly determined, after consideration of the staff's analysis and recommendation. In short, we feel that the procedure set out in Appendix A will greatly benefit the Commission, particularly in freeing the Commissioners to concentrate on important policy matters, without diminishing in any substantial way the parties' rights to full and fair administrative process.

III.

1. The Commission strongly endorses the provision in H.R. 7333 (section 2) giving the Commission authority to delegate in adjudicatory cases. Such provision is needed to permit the use of panels of Commissioners or employee boards to pass on cases other than those involving major

policy or legal issues. Without this provision, it would still be necessary for Commissioners to hear such cases as fishing boat suspensions or routine aural broadcast matters. With it, the Commission will be able to concentrate on the important cases, and the hearing of all cases by some authority within the agency should be substantially expedited. We would not expect the provision for discretionary review of a delegated decision to add a new factor of delay, since we would hope that, for the most part, such decisions made in these routine cases would be correct and thus the application could be quickly acted upon.

2. We do, however, disagree with several aspects of section 2 of the bill:

(i) The section provides that any delegation rule or order may be rescinded by a vote of a majority, less one. We think this provision is unnecessary. First, it is apparently based on the fact that review under H.R. 7333 is discretionary, and therefore should be controlled by a "rule of three" comparable to the Supreme Court's "rule of four" with respect to the discretionary certiorari review; thus, if our suggestion is adopted that review be afforded as matter of right, the provision is no longer needed. More important, experience does not support its inclusion. The Commission has long had complete discretion to delegate all non-adjudicatory matters and in fact has made extensive delegations. These delegation activities have worked well -- and without any indication of partisan abuse -- under the present provisions of 5(d)(1), which do not contain any "rule of three".

(ii) The section provides that the requirements of paragraphs (a), (b), (d) and (d) of section 4 of the Administrative Procedure Act shall apply in the case of any delegation rule. This provision is somewhat ambiguous (since 4(a) exempts rules of agency organization, procedure or practice, except where notice is required by statute, and section 2 of the bill does not in terms require such notice). But it presumably is meant to require the Commission to give notice and an opportunity for comment whenever it proposes to enter a delegation rule. Such a rule is a matter very largely within the judgment of the agency, which alone knows and can evaluate the demands upon its time and the capabilities of its staff. We have issued and revised many such delegation rules (see, e.g., 0.201-0.333, 47 C.F.R. 0.201-0.333), always as an internal matter, without notice or opportunity for comment. This does not mean that we would not employ the formal rule making procedures of 4(a) and (b) in some future instance. But we strongly believe that the

matter should be one within the Commission's discretion; otherwise, revisions or extensions of the many present delegations will all have to go through the somewhat lengthy and, we think, in this respect, largely useless procedure of formal rule making. Significantly, interested parties such as the bar could always petition under 4(d) for amendment or repeal of any rule, including these delegation regulations.

(iii) In our view, the Commission would not be required, under 5(d)(3), to give reasons for denial of an application for review; this is our interpretation of the provision as it now appears in similar language in section 5(d)(2). But an argument has been made that under sections 6(d) and 8(a) of the Administrative Procedure Act and the last sentence of section 409(b) (retained in the bill as part of 409(a)), rulings on the merits of the application would be required. Since it is of critical importance that the application for review may be denied (or granted) without assigning reasons therefor, we think the law should be explicit on this score. We would suggest the inclusion of a provision similar to 409(d) in Appendix A or the revision of 409(a) in the bill to read as follows:

> "All decisions, including the initial decision, shall become a part of the record and, except for decisions granting or denying an application for review under section 5(d)(3), shall include a statement of (1) findings and conclusions, as well as the basis therefor, upon all material issues of fact, law, or discretion, presented on the record; and (2) the appropriate decision, order, or requirement."

This revision, as complemented by the present 409(d), would remove all doubts.

(iv) We think the statutory scheme should make clear that an application for review is a condition precedent to judicial review and that no such application may rely upon questions of fact or law which the designated authority within the Commission has been afforded no opportunity to pass. In this way, the case will be presented to the Commission (and if the application is denied, to the courts) with a ruling on every issue, and the Commission will have an opportunity to review the decision before the matter goes before the courts. In Appendix A, we have set out such a scheme, and have revised section 405 to reflect it.

IV.

Section 2 of the bill also provides for the transfer of assignment functions (excluding assignment of Commissioners) from the Commission to the Chairman. We do not believe any revision of existing law is needed in this respect. The Commission has already delegated to the Chairman a great deal of authority in this area and undoubtedly would delegate further authority to assign personnel to hear adjudicatory cases, should H.R. 7333 become the law. For the Chairman is the agency's chief executive officer, with the duty "generally to coordinate and organize the work of the Commission in such manner as to promote prompt and efficient disposition of all matters within the jurisdiction of the Commission" (section 5(a)). But the Commission feels that such assignment authority should stem from the Commission and not the statute: In this way a future Chairman will be bound to act fairly in his assignments. While it is true that other checks on abuse of such authority would exist (such as rescission of the delegation and consideration of the matter by the full Commission), such checks are more cumbersome and do not, we think, carry the same psychological weight. This, in effect, is the way several of the Federal courts of appeal operate: Under a general provision requiring that assignments are to be made as the court directs (28 U.S.C. 46), several circuits have delegated to the Chief Judge the authority to assign the judges to the panels. In short, we agree with the objective of this provision but think it can be more wisely accomplished by agency, rather than statutory, action.

Attachment: Appendix A

Adopted: June 7, 1961

A BILL

To amend the Communications Act of 1934, as amended, in order to expedite and improve the administrative process by authorizing the Federal Communications Commission to delegate functions in adjudicatory cases, repealing the review staff provisions, and revising related provisions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that subsection (c) of section 5 of the Communications Act of 1934, as amended, is hereby repealed.

Section 2. Subsection (d) of section 5 of the Communications Act of 1934, as amended, is amended to read as follows:

(1) When necessary to the proper functioning of the Commission and the prompt and orderly conduct of its business, the Commission may, by rule or order, delegate any of its functions to a panel of commissioners, an individual commissioner, an employee board, or an individual employee, including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business or matter, and may at any time amend, modify, or rescind any such rule or order. Nothing in this subsection shall modify the provisions of section 7(a) of the Administrative Procedure Act.

(2) Any order, decision, or report made or other action taken, pursuant to any such delegation, unless reviewed as provided in subsection (3), shall have the same force and effect, and shall be made, evidenced and enforced in the same manner, as orders, decisions, reports, or other actions of the Commission.

(3) Any person aggrieved by any such order, decision or report may file an application for review by the Commission within such time and in such manner as the Commission shall prescribe. The Commission shall have authority on its own initiative to order any matters delegated under subsection (1) before it for review on such conditions as it shall prescribe and shall make such orders therein, consistent with law, as shall be appropriate.

(4) In passing upon applications for review, the Commission may grant in whole or in part, or deny such applications without specifying any reasons therefor. No such application for review shall rely on questions of fact or law upon which the individual commissioner, panel of commissioners, employee board, or individual employee, has been afforded no opportunity to pass.

(5) If the Commission grants the application for review, it may affirm, modify, or set aside the order, decision, or report made, or other action taken in accordance with section 405.

(6) The filing of an application for review shall be a condition precedent to judicial review of any order, decision, or report made or other action taken. The time within which a petition for review must be filed in a proceeding to which section 402(a) applies or within which an appeal must be taken under section 402(b), shall be computed from the date upon which public notice is given of orders disposing of all applications for review or exceptions filed in any case.

(7) The Secretary and seal of the Commission shall be the secretary and seal of each panel of the Commission, each individual commissioner, and each employee board or individual employee exercising functions delegated pursuant to subsection (1) of this section.

Section 3. Section 405 of the Communications Act of 1934, as amended, is hereby amended to read as follows:

After a decision, order, or requirement has been made in any proceeding by the Commission or designated authority within the Commission under section 5(d)(1), any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for rehearing only to the authority making the decision, order, or requirement; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 5(d)(1),

in its discretion, to grant such a rehearing if sufficient reason therefor be made to appear. Petitions for rehearing must be filed within thirty days from the date upon which public notice is given of any decision, order, or requirement complained of. No such application shall excuse any person from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for rehearing shall not be a condition precedent to judicial review of any such decision, order, or requirement, except where the party seeking such review (1) was not a party to the proceedings resulting in such decision, order, or requirement, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for rehearing or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: Provided, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission shall take such action within ninety days of the filing of such petition. Rehearings shall be governed by such general rules as the Commission may establish. The time within which a petition for review must be filed in a proceeding

to which section 402(a) applies, or within which an appeal must be taken under section 402(b), shall be computed from the date upon which public notice is given of orders disposing of all petitions for rehearing filed with the Commission in any case, but any decision, order, or requirement made after such rehearing reversing, changing, or modifying the original order shall be subject to the same provisions with respect to rehearing as an original order.

Section 4. Section 409(a), (b), (c) and (d) of the Communications Act of 1934, as amended, are amended to read as follows:

(a) In every case of adjudication (as defined in the Administrative Procedure Act) which has been designated for hearing by the Commission, the hearing shall be conducted in accordance with the provisions of the Administrative Procedure Act and such other rules as the Commission may prescribe not inconsistent therewith.

(b) In such cases any party to the proceeding shall be permitted to file exceptions and memoranda in support thereof to such initial, tentative, or recommended decision, which shall be passed upon by the Commission or the authority to whom the matter may have been delegated under section 5(d)(1).

(c) In any case of adjudication (as defined in the

Administrative Procedure Act) which has been designated for hearing by the Commission, no person except to the extent required for the disposition of ex parte matters as authorized by law, shall directly or indirectly make any presentation respecting such case to the hearing officer, unless upon notice and opportunity for all parties to participate; provided that a Commissioner conducting the hearing shall be permitted to consult with his assistants and to participate, without restriction because of his conduct of the hearing, with the Commission upon review of the case or any other matter; provided further that examiners shall be permitted to consult with other examiners on questions of law. No person except to the extent required for the disposition of ex parte matters as authorized by law, and except for officers, employees or agents of the Commission not engaged in the performance of investigative or prosecuting functions for the Commission in such case or a factually related case, shall directly or indirectly make any presentation respecting such case to the Commission or designated authority within the Commission, unless upon notice and opportunity for all parties to participate.

(d) To the extent that the foregoing provisions of this section and section 5(d)(4) are in conflict with the provisions of the Administrative Procedure Act, such provisions

of this section and section 5(d)(4) shall be held to supersede and modify the provisions of the Act.

Section 5. Notwithstanding the foregoing provisions of this Act, the second sentence of subsection (b) of section 409 of the Communications Act of 1934 (which relates to the filing of exceptions and the presentation of oral argument), as in force at the time of the enactment of this Act, shall continue to be applicable with respect to any case of adjudication (as defined in the Administrative Procedure Act) set for hearing by the Federal Communications Commission by a notice of hearing issued prior to the date of the enactment of this Act.

The hearing examiner does not act under delegated authority in conducting a hearing or in ruling on interlocutory matters pursuant to section 7(b).

[illegible] Rulings

The Com. may delegate to a panel of 3 commissioners the function of hearing petitions for review of initial decisions. Such panel may hear oral argument on the [illegible] & [illegible]. It shall [illegible] the recommendations of the review staff.

STATEMENT OF ORGANIZATION

Section 0.141 The Office of Opinions and Review.

Section 0.141 has been revised to remove restrictions previously imposed on the review staff. It also provides that the review staff will assist individual commissioners and panels designated to perform the Commission's review functions. Any further changes may more properly be originated by Mr. Berkemeyer.

Section 0.201 General provisions.

Section 0.201 is new and is essensially an information section. Paragraph (a), however, is worthy of note in that it lists the categories of delegations which have been taken into account in the draft rules. Any substantive change in this paragraph will require corresponding adjustments in other sections.

Paragraph (a)(1) is self-explanatory.

Paragraph (a)(2) preserves the distinction between rulings of the Chief Hearing Examiner and the Motions Commissioner on the one hand, and of persons designated to conduct a hearing on the other.

The Chief Hearing Examiner and Motions Commissioner act under authority specifically delegated pursuant to 5(d). Their rulings are subject to the review provisions of 5(d)(4), and the reconsideration provisions of new section 405.

Persons who conduct a hearing, whether under 5(d) or 409, act by virtue of their authority to control the course and conduct of the hearing. The provisions of 5(d)(4) and 405 do not apply to interlocutory actions taken by persons authorized to conduct a hearing under section 409. It is open to question whether sections 5(d)(4) and 405 apply to interlocutory actions taken by persons authorized to conduct hearings under section 5(d).

Thus the procedures for reconsideration and review of interlocutory rulings need not be the same for examiners (for example) as they are for the Chief Hearing Examiner. The petition for reconsideration required in the case of the Chief Hearing Examiner is not required in the case of the examiner. The 30 day filing period allowed in the one case could be reduced in the other.

For purposes of simplicity, however, I have applied the same rules to all interlocutory actions and, in my judgment, this is the better course.

Paragraph (a)(3), like the remainder of the draft, makes no reference to an employee review board. It will not be difficult to include appropriate provisions after the nature of the board is known—particularly whether it is to be a standing board (or boards) or whether boards of employees are to be designated on a case by case basis.

The draft rules do not refer to recommended or tentative decisions. So far as I know, there is not inclination to use such decisions. Their use would appear to be contrary to a primary objective of the new act, i.e., to remove the burdens of the decision-making process to a lower level.

In paragraph (a)(4), I have deliberately used the term, "hearings to which section 7 of the Administrative Procedure Act and section 409 of the Communications Act do not apply."

New section 5(d)(1) provides that only an examiner, commissioner, or panel may be designated to conduct a hearing to which section 7 of the APA applies. Section 7 applies to all cases required by statute to be determined on the record after opportunity for agency hearing. Thus only an examiner, commissioner, or panel may be designated to conduct a hearing in a case which is required by statute to be determined on the record after opportunity for agency hearing.

New section 5(d)(2) provides that no one designated to conduct a hearing under section 5(d) may issue an initial decision. Initial decisions are issued under section 409 by persons designated to conduct hearings in cases of adjudication (as defined in the APA) which have been designated for hearing. APA section 2(d) defines adjudication as any agency process which is not rule making. Thus no one may be designated to conduct a hearing under section 5(d) in any case which is not a rule making case.

There are thus four categories of cases, and it would be possible, as indicated below, to apply different rules to each category:

(1) Adjudicative cases which are required by statute to be determined on the record after opportunity for an agency hearing.

(a) Such cases may be heard only under section 409.

(b) Such cases may be heard only by an examiner, commissioner, or panel.

2. Adjudicative cases which are <u>not</u> required by statute to be determined on the record after opportunity for an agency hearing.

(a) Such cases may be heard only under section 409.

(b) Such cases may be heard by any one.

3. Rule making cases which are required by statute to be determined on the record after opportunity for an agency hearing.

(a) Such cases may be heard under section 5(d) or section 409.

(b) Such cases may be heard only by an examiner, commissioner, or panel.

4. Rule making cases which are not required by statute to be heard on the record after opportunity for an agency hearing.

(a) Such cases may be heard under section 5(d) or section 409.

(b) Such cases may be heard by any one.

In my judgment, however, it is unnecessary and undesirable to apply different rules to each of these four categories. The great bulk of Commission cases are in categories one or four. (Experimental applications may well fall in category two; and I believe certain common carrier cases fall in category 3.) It is probable, moreover, that the Commission would wish cases in categories two and three to be heard by an examiner under section 409. This being the case, it seems advisable to apply the more stringent requirements of category one to categories two and three as well. This has been done in the draft rules. Thus it is provided that persons will not be designated under section 5(d) to hear cases to which section 7 and section 409 apply; and that only an examiner, commissioner, or panel will be designated to hear such cases.

Section 0.202 Authority of person, panel, or board to which functions are delegated.

Section 0.202 is basically the same as present §0.201(b). Section 1.86 states the circumstances under which an action taken pursuant to delegated authority will be stayed.

Section 0.203 Authority delegated in certain hearing proceedings.

Section 0.203 is basically the same as present section 0.218, which is deleted. The section has been expanded to cover hearings held

by employees as well as commissioners, and because of this has been placed under the heading "General" rather than "Commission".

Section 0.210 Designation of individual commissioners or panels to review initial decisions.

The provisions of this section constitute a guess as to how far the Commission will wish to go in this respect. It would appear, however, that the full Commission should initially determine the level upon which a case is to be heard.

Section 0.218 is replaced by §0.203.

Section 0.222 is amended to reflect the ~~redixigx~~ redesignation of 0.218 as 0.203, and to reflect the changes in new section 0.203.

Sections 1.41-1.47, Interlocutory actions in hearing proceedings.

These sections have been amended to reflect the fact that interlocutory rulings may be made by person other than the Chief Hearing Examiner, Motions Commissioner, or Hearing Examiner. Section 1.42 provides for extra copies of pleadings if more than one person is presiding.

Section 1.47 is replaced by §§1.81-1.86, which set forth procedures applicable to the reconsideration and review of all actions taken pursuant to delegated authority, and to all interlocutory actions.

Sections 1.81-1.86,. Reconsideration and review of actions taken pursuant to delegated authority.

These sections apply to any action taken pursuant to authority delegated under section 5(d) of the new act. They also apply to all interlocutory actions in hearing proceedings, whether taken pursuant to authority delegated under section 5(d) or k otherwise. See comments on section 0.201(a)(2).

Section 1.82 covers the petition for reconsideration filed with the person who took the action pursuant to section 405 of the new act. Section 1.83 covers the application for review filed with the Commission under section 5(d)(4) of the new act. The draft rules specify that both must be filed within 30 days after the action is taken, except in the case of interlocutory actions, where the application for review must be filed within 5 days. The thirty day period for filing a petition for reconsideration is set by statute and cannot be reduced. The filing period for an application for review lies in the Commission's discretion.

The draft rules provide so far as possible that new matters of fact only may be presented on a petition for reconsideration. Section 1.82(b) specifies the circumstances under which new matters may be raised. Section 1.82(b)(3) specifies a public interest exception to this rule. The section 1.82(b)(4) exception is provided because of the new section 405 provision which precludes judicial review if the party seeking review was not a party to the xpx proceedings resulting in the action taken pursuant to delegated authority. (Where the Commission denies an application for review, it is my understanding that the court will review the action taken pursuant

to delegated authority. The denial of an application for review is not treated in the draft rules as a Commission action which is subject to reconsideration under section 405. See section 1.191(d).)

The only apparent alternative is to permit parties to raise old matters on a petition for reconsideration and to raise new matters only if the restrictions set forth in section 1.82(b) are met. I do not believe that persons who act pursuant to delegated authority should be called upon to reconsider their actions unless petitioner has new facts to offer, or that proceedings should be delayed for that purpose. Section 1.85, moreover, provides the designated authority sufficient opportunity to modify his action, either on his own motion or on a petition so requesting, without requiring any action on his part if he believes his original action is sound.

The statute provides that an application for review should not rely on questions of fact or law upon which the designated authority has been afforded no opportunity to pass. Section 1.83(c) of the draft rules specifies that any question may be raised in such application if it is based on facts which were before the designated authority.

Under the draft rules, action taken on reconsideration or review is not itself subject to reconsideration or review unless the original action is reversed or modified. The statute requires no more. Thus if the petition or application is denied, or if the original action is affirmed, no further remedies are available. If the proceeding is remanded, it would appear that reconsideration or review should await the final action taken by the remanding authority after the matter

is returned to it. An order setting aside any action would normally be accompanied by an order reversing or modifying the original action or remanding the proceedings.

From this it will be seen that the simultaneous filing of an application for review and petition for reconsideration presents certain problems. The filing of an application for review is a condition precedent to judicial review. A party having new factual matters to present would be foolhardy to rely on the petition for reconsideration alone, for denial of the petition or affirmance of the original action would leave him without further remedy. He will therefore file both a petition for reconsideration and an application for review, creating a dual jurisdiction situation involving the Commission and the designated authority. The Commission, it would seem, would wish to defer action on the application for review until it knew whether the original action pursuant to delegated authority would be modified on reconsideration, and section 1.83(g) so provides.

It would be far less complicated to provide for the filing of applications for review only after final action on any petition for reconsideration. But it would be less expeditious to do so. It is to hoped that the restrictions on matters to be raised in a petition for reconsideration will greatly reduce the number of such petitions filed. Frivolous petitions filed for delaying purposes may be quickly denied. Consecutive filing, moreover, would result in far greater delay. The application for review could not then be filed until expiration of the thirty day statutory period allowed for filing petitions for reconsideration, even if no petition for reconsideration is filed. This would be

particularly grievous in the case of interlocutory rulings in hearing proceedings.

Sections 1.82(e) and 1.83(d) specify a petition (application)—opposition procedure. The time for filing oppositions is dated from the date the petition is filed, but could as easily be dated from expiration of the filing period.

Sections 1.82(e) and 1.83(d) prohibit the filing of any pleading other than ~~xxxxxxx~~ oppositions after expiration of the 30 day period for filing the petition or application. This prohibition includes supplements to the petition and is in this respect more rigid than the comparable provision in section 1.191(d) of the present rules. I believe the more rigid provision to be preferable.

Section 1.83(e) provides a procedure for review of interlocutory rulings in hearing proceedings which is essentially the same as Commissioner Ford's proposal in Docket 12571. Commissioner Ford's proposal provided for review with review of the final action unless the person making the ruling permitted an immediate appeal. This approach raises difficult legal problems in the case of rulings made under section 5(d). The draft rules provide for review with the final action unless the Commission grants the application for review. Since the Commission ~~xx~~ need not list its reasons for denial, and since it may act on specific recommendations made by the Office of Opinions and Review, this difference should present ~~x~~ no practical difficulty; and ~~x~~ we thereby eliminate the legal difficulties inherent in the Docket 12751 approach.

Section 1.143 Designation of presiding officer.

The amendment deletes the proviso in section 1.143(a), thereby permitting a commissioner or panel to preside in cases of adjudication.

Section 1.153 Appeal and review of initial decisions.

Section 1.153(c)(1) is new.

Section 1.154 Exceptions; oral argument.

The mandatory oral argument provisions have been deleted from section 1.154(c).

Section 1.191 Petition for reconsideration of action taken by the Commission en banc.

This section is basically the same as section 1.82.

Section 1.191(d) provides that the Commission will not reconsider an order denying an application for review or affirming an action taken pursuant to delegated authority. This is based on the thesis that the Commission order in such cases constitutes a refusal to act and that the significant action after the Commission order is that taken pursuant to delegated authority. This at least eliminates one absurdity which would otherwise prevail—that the Commission may deny an application for review without reasons but must furnish reasons in denying a petition for reconsideration of the same action.